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Supreme Court, U.S.
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No. 99-9073

In The

Supreme Court of the United States

PAULA L. BUFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE PETITIONER

Of Counsel

ROBERT A. KAGEN
316 North Milwaukee
Street, Suite 401
Milwaukee, Wisconsin
53202
(414) 271-8989

DEAN A. STRANG
Counsel of Record
BRIAN P. MULLINS
FEDERAL DEFENDER
SERVICES OF EASTERN
WISCONSIN, INC.
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 221-9900
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

The district court found Petitioner's prior convictions in state court not "related" under § 4A1.2(a)(2) of the United States Sentencing Guidelines. Should the court of appeals have reviewed that conclusion de novo, rather than for clear error?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
SENTENCING GUIDELINE PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. OVERVIEW: THE COURT'S MIXED QUESTION STANDARD OF REVIEW JURISPRUDENCE SINCE 1985	13
A. De Novo Review	13
B. Deferential Review	20
II. THE SEVENTH CIRCUIT INCORRECTLY APPLIED THIS COURT'S DECISIONS	24
A. Seventh Circuit's Focus	25
B. The Proper Role of *Koon*	27
C. Why Appeals At All?	30
III. DE NOVO REVIEW OF THIS MIXED QUESTION BEST ASSIGNS JUDICIAL DUTIES IN THE FEDERAL COURTS	33
A. Synopsis	33
B. Analysis	33
CONCLUSION	40

TABLE OF AUTHORITIES

	Page
CASES	
Anderson v. Bessemer City, 470 U.S. 564 (1985)	34
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)	13
Brinegar v. United States, 338 U.S. 160 (1949)	18
Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A., 176 F.3d 601 (2d Cir. 1999)	35
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)	22, 28, 31
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	18
Hanna v. Plumer, 380 U.S. 460 (1965)	38
Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986)	26
Koon v. United States, 518 U.S. 81 (1996)	*passim*
Lilly v. Virginia, 527 U.S. 116 (1999)	16, 17, 19
Miller v. Fenton, 474 U.S. 104 (1985)	14, 33
Mistretta v. United States, 488 U.S. 361 (1989)	19
Ornelas v. United States, 517 U.S. 690 (1996)	*passim*
Pierce v. Underwood, 487 U.S. 552 (1988)	*passim*
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	13, 26
Salve Regina College v. Russell, 499 U.S. 225 (1991)	19, 33, 34
Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1941)	38
Stinson v. United States, 508 U.S. 36 (1993)	12
Thompson v. Keohane, 516 U.S. 99 (1995)	15, 20, 27

TABLE OF AUTHORITIES – Continued

Page

United States v. Allen, 153 F.3d 1037 (9th Cir. 1998), *cert. denied*, 525 U.S. 1170 (1999) 24

United States v. Bajakajian, 524 U.S. 321 (1998) 16

United States v. Bartolotta, 153 F.3d 875 (8th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999) 24

United States v. Beckett, 208 F.3d 140 (3d Cir. 2000) 24

United States v. Buford, 201 F.3d 937 (7th Cir. 2000) ..*passim*

United States v. Correa, 114 F.3d 314 (1st Cir.), *cert. denied*, 522 U.S. 927 (1997) 24

United States v. D.F., 63 F.3d 671 (7th Cir. 1995), *vacated and remanded*, 517 U.S. 1231 (1996) 27

United States v. D.F., 115 F.3d 413 (7th Cir. 1997) 27

United States v. Doe, 18 F.3d 41 (1st Cir. 1994) 29, 35

United States v. Frederick, 182 F.3d 496 (7th Cir. 1999) 27

United States v. Huggins, 191 F.3d 532 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1968 (2000) 24

United States v. Huskey, 137 F.3d 283 (5th Cir. 1998) 24

United States v. Irons, 196 F.3d 634 (6th Cir. 1999) 24

United States v. Mapp, 170 F.3d 328 (2d Cir.), *cert. denied*, 120 S. Ct. 239 (1999) 24

United States v. Mullens, 65 F.3d 1560 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112 (1996) 24

United States v. Rivera, 994 F.2d 942 (1st Cir. 1993) ..29, 35

TABLE OF AUTHORITIES – Continued

Page

United States v. Wiseman, 172 F.3d 1196 (10th Cir.), *cert. denied*, 120 S. Ct. 211 (1999) 24

Williams v. United States, 503 U.S. 193 (1992) 37

CONSTITUTION

U.S. Const. amend. IV 15

U.S. Const. amend. VI 17

U.S. Const. amend. VIII 16

STATUTES

18 U.S.C. § 2113(a) 5

18 U.S.C. § 2113(d) 5

18 U.S.C. § 3742(e) 23, 26, 30

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d) 14

28 U.S.C. § 2412(d) 21

RULES

Fed. R. Civ. P. 11 22

Fed. R. Civ. P. 44.1 35

Fed. R. Civ. P. 52(a) 11, 13, 26, 34

Fed. R. Crim. P. 26.1 35

U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 ..... *passim*

U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 .....2, 5

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993 (1993) 32

Daniel P. Bach, *Reconsidering Related Conduct*, 9 FED. SENT. REP. 198 (1997) 35, 39

Francis A. Bohler, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924)..... 13

Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235 (1991) 25

Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1 (1991)..... 21

Paul Gewirtz, *On 'I Know It When I See It,'* 105 YALE L.J. 1023 (1996).....32, 39

Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 FED. SENT. REP. 192 (1997) 35

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit published its opinion, Joint Appendix (App.) 54-63, which is reported at 201 F.3d 937 (2000). The oral decision of the United States District Court for the Eastern District of Wisconsin, App. 16-43, went unreported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on January 12, 2000. Petitioner filed a petition for a writ of certiorari on April 10, 2000, which this Court granted on September 26, 2000. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

SENTENCING GUIDELINE PROVISIONS INVOLVED

§ 4A1.2 Definitions and Instructions for Computing Criminal History

(a) Prior Sentence Defined

(2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b), and (c). Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

§ 4A1.2 Commentary, Application Note 3

Related Cases

Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that he presents to the public. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as related because the cases were consolidated for sentencing, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which he has committed crimes. In such circumstances, an upward departure may be warranted. Note that the above example refers to serious non-violent offenses. Where prior related sentences result from convictions of crimes of violence, § 4A1.1(f) will apply.

§ 4B1.1 Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior

felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12.

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

§ 4B1.2 Definitions of Terms Used in Section 4B1.1

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of

violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

STATEMENT OF THE CASE

Congress established the United States Sentencing Commission and a sentencing guideline regimen to achieve uniform sentences for similarly situated federal offenders. Consistent application of the Sentencing Guidelines' terms advances uniformity in sentencing. This case invites the Court to decide whether the federal appellate courts will control the ultimate conclusions that determine which prior convictions are "related" under U.S. SENTENCING GUIDELINES MANUAL § 4A1.2. That mixed question of relatedness often bears significantly on the length of sentence a district court imposes.

This case is a good example. Petitioner Paula Buford robbed a bank, faced indictment in federal court, and pled guilty. At sentencing, the district judge decided that earlier state court sentences imposed concurrently by the same judge during the same hearing, but in cases bearing different docket numbers for reasons peculiar to that state court, were not "related" for purposes of § 4A1.2. That decision roughly doubled Petitioner's sentencing guideline range.

On appeal, the United States Court of Appeals for the Seventh Circuit acknowledged that the standard of review might determine the outcome. Other circuits had split on the question. The Seventh Circuit chose a deferential standard to assess whether the prior state convictions were related, and affirmed. Broadly, those facts bring Petitioner before this Court.

1. In closer detail, Petitioner robbed a bank in Milwaukee, Wisconsin, on March 18, 1998. A federal grand jury indicted her for armed bank robbery, 18 U.S.C. § 2113(a) & (d). She pled guilty less than six weeks later. App. 6-7, 17.

At sentencing, the parties disputed whether two prior state court convictions were "related" under § 4A1.2 of the Sentencing Guidelines and its application note 3. App. 18-26. If related, then those cases counted only as one conviction, and Petitioner's sentencing guideline range was 84-105 months. App. 54. If unrelated, the two cases counted as two convictions, the career offender guideline (U.S. SENTENCING GUIDELINES MANUAL § 4B1.1) applied, and the guideline range jumped to 188-235 months. App. 54. The district court resolved the dispute against Petitioner, App. 23-28, and sentenced her to the bottom of the higher range, 188 months. App. 39, 45. Petitioner now serves that 15-year, 8-month sentence. The maximum sentence under the lower range would have been 8 years, 9 months.

2. The disputed earlier state court cases both arose from Petitioner's arrest on January 23, 1992. *See* App. 56-57; *see also* Buford's Supplemental Appendix in the United States Court of Appeals for the Seventh Circuit

(7th Cir. Supp. App.) 132, 151.[1] The police arrested her for robbing a gas station at gunpoint earlier that day. App. 56. Searching her home, police officers found cocaine, a gun, cash, and other evidence. App. 56. Petitioner then confessed to several robberies and to selling cocaine. 7th Cir. Supp. App. 151-52, 132.

On January 27, 1992, the Milwaukee County District Attorney's office filed two separate criminal complaints, docketed sequentially as F-920368 and F-920369. 7th Cir. Supp. App. 132-33, 150-52. The former case charged five armed robberies, the first on March 18, 1990 and the last on January 23, 1992. 7th Cir. Supp. App. 150-54.

The latter case charged a single count of possessing cocaine with intent to deliver on January 23, 1992. An assistant district attorney assigned only to drug cases filed that complaint and pursuant to local statutory and administrative scheme, it went to "drug court." 7th Cir. Supp. App. 175. That prosecutor later explained, at Petitioner's joint sentencing on both cases, that, "As to the drug charge, mine was done separately because we have a drug court. . . . " 7th Cir. Supp. App. 175.

So initially, the armed robbery case went to Judge Wedemeyer's branch, and the drug case to Judge Geske's. 7th Cir. Supp. App. 137, 158-59.

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[1] The Supplemental Appendix in the Seventh Circuit is lengthy and contains much handwritten, stamped, or nearly illegible material that could not be reproduced for the Joint Appendix. For the Court's convenience, then, Petitioner cites directly to the Supplemental Appendix filed in the Seventh Circuit.

With the exception of one robbery that she persuaded the prosecutor she did not commit, 7th Cir. Supp. App. 164, Petitioner later pled guilty to all charges. She pled guilty on two different days, but now in the same branch of the state court, Judge Geske's. *See* 7th Cir. Supp. App. 140-49, 163-70, 138, 159 (state court transcripts and docket entries on March 20, 1992 and April 20, 1992 reflecting both guilty pleas in Judge Geske's branch).[2] The same law firm represented her in both cases. 7th Cir. Supp. App. 141, 164.

The state court record suggests why the guilty pleas came in the same branch,[3] after the cases started in two. Between Petitioner's guilty plea in the drug case and her guilty pleas in the armed robbery case, her lawyer wrote to Judge Geske's deputy clerk, confirming a telephone conversation:

> As you may recall, during the entry of the plea on the drug case, case number F-920369, Judge

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[2] In conflict with the docket sheets, the second guilty plea transcript shows that Judge DiMotto, the original judge in neither case, presided during Petitioner's guilty plea in the armed robbery case. 7th Cir. Supp. App. 163. Counsel shares the assumption of Petitioner's first lawyer that Judge DiMotto handled Judge Geske's calendar that day, for reasons now lost. *See* Petition for Writ of Certiorari, at 8 n.3 (April 10, 2000). In all events, though, the pleas occurred in the same branch.

[3] The Seventh Circuit's opinion mistakenly implied that the guilty pleas occurred before the different judges originally assigned. App. 57; *United States v. Buford*, 201 F.3d 937, 939 (7th Cir. 2000). At a minimum, the docket sheets demonstrate that the guilty pleas occurred in only one branch of the circuit court. Further, for all the state court record shows, Judge DiMotto played no role in either case at any other time.

> Geske "volunteered" to have the Armed Robbery charges consolidated into her court for the entry of a plea and sentencing. My client, the District Attorney and myself [sic] would like to take Judge Geske up on her offer.

7th Cir. Supp. App. 162. The letter went on to set out the anticipated guilty plea arrangements, the parties' intentions for a presentence report, and the agreed sentencing date. 7th Cir. Supp. App. 162. It listed copies to both assistant district attorneys. 7th Cir. Supp. App. 162.

During Petitioner's subsequent guilty pleas on the armed robbery case, again in Judge Geske's branch, her lawyer asked that the presentence report in the drug case apply to the armed robbery case as well and also asked for sentencing on the same date as the drug case. 7th Cir. Supp. App. 165. The prosecutor seemed to agree. 7th Cir. Supp. App. 165.

Judge Geske in fact conducted a single sentencing hearing on May 21, 1992 that addressed all charges. 7th Cir. Supp. App. 171-94. Both assistant district attorneys appeared and argued for the state.

Judge Geske imposed entirely concurrent sentences: twelve years in prison on two of the armed robberies, and six years on the drug count. 7th Cir. Supp. App. 189-91. She withheld sentence on the remaining two armed robberies and placed Petitioner on concurrent fifteen-year terms of probation. 7th Cir. Supp. App. 190. Judge Geske gave Petitioner identical credit for pretrial incarceration on both cases. 7th Cir. Supp. App. 189, 191. The judge commented on the armed robberies that "it's pretty clear

that they were all motivated by your drug addiction which again is no excuse." 7th Cir. Supp. App. 182.

That statement echoed the armed robbery prosecutor's observation that, "Looking at the [probation] agent's impressions, the attached letter, it is clear that the defendant has a problem with drugs and other substances. I think the community's interest in being protected from her when she has taken up a weapon to support her habit is a strong one. . . . " 7th Cir. Supp. App. 174. The drug prosecutor said that because the drug violation "was done independent of the armed robberies, I am not taking any position how that should impact relative to the armed robbery counts." 7th Cir. Supp. App. 175.

Judge Geske entered two separate judgments of conviction, consistent clerically with the two separate case numbers. 7th Cir. Supp. App. 135, 155-56. The drug case judgment referred expressly to the armed robbery case in imposing the concurrent six-year sentence. 7th Cir. Supp. App. 135. Neither docket sheets nor judgments, though, reflected any formal order of consolidation. Only the last sheet of the docket in case number F-920369 referred to documents filed in the other case. 7th Cir. Supp. App. 139.

3. In the federal case, after reviewing Petitioner's objections and the state court record, the district judge concluded that the 1992 armed robbery and drug cases were not related. App. 20-22, 24-26. The judge commented that he might be missing something, but that on the factual record, "I don't even think this is a close case, to be quite candid." App. 23.

4. In contrast, the Seventh Circuit wrote, "Because elements of Buford's situation support either characterization [functional consolidation or no], the standard of appellate review may be dispositive." App. 59; *United States v. Buford*, 201 F.3d 937, 940 (7th Cir. 2000). If reviewed de novo, the Seventh Circuit went on to note, "this appeal could come out either way." App. 59; 201 F.3d at 940. After assessing conflicting decisions within the circuit and the split among other circuits, the unanimous panel, through Judge Easterbrook, adopted a clear-error standard of review. App. 59-62; 201 F.3d at 940-41.

Because it ruled that the district judge did not commit clear error in describing the joint sentencing as a matter of administrative convenience rather than a consolidation for sentencing, the court of appeals affirmed. App. 62-63; 201 F.3d at 941.

5. Petitioner asked this Court to review her case. On September 26, 2000, the Court granted her petition for a writ of certiorari.

SUMMARY OF ARGUMENT

1. Over the last fifteen years or more, this Court has taken a practical, ad hoc approach to assigning standards of review for mixed questions of law and fact. The Court asks which actor, district court or appellate, is suited best to decide the mixed issue at stake. De novo review usually governs when the issue does not turn on credibility assessments; when relevant legal principles acquire meaning only through application to particular facts;

when deferential review would lead to intolerably inconsistent results; when appellate courts should maintain especially close control of the legal principles; or when a defined set of rules would aid actors whom the legal standards affect. Several of those factors appear here, while those that lead to deferential review do not.

2. Here, the Seventh Circuit misunderstood this Court's teaching. It reduced a mixed question of law and fact to a pure question of fact, and then relied too heavily on cases arising under Fed. R. Civ. P. 52(a). The Seventh Circuit overlooked the distinction between historical facts and ultimate conclusions. That court also read *Koon v. United States*, 518 U.S. 81 (1996), with unsupported breadth, failing to acknowledge that relatedness and consolidation of prior convictions are narrow questions turning on documents and interpretation of legal terms, not on credibility or traditional discretion. Finally, it made an argument for ending appeals of right altogether, but not a useful argument for deciding the proper standards of review on such appeals.

3. This Court should direct de novo review of the relatedness or consolidation of prior convictions. These mixed questions depend on documents, not on demeanor, and invoke an appellate court's strengths. Textual interpretation matters much here. Further, the determination at issue is akin to discerning foreign law or state law in diversity cases, issues that appellate courts give independent review. De novo review also will serve Congress's goal of uniformity in federal sentencing. In the end, it will advance the interests of federalism by removing state

procedure from substantive federal sentencing, and making clearer to state courts how federal courts later will view their actions.

ARGUMENT

Paula Buford relies on consolidation to establish that her prior state convictions were "related" under § 4A1.2(a)(2) of the Sentencing Guidelines. Most of her prior crimes did not occur on the same occasion, and they did not necessarily form a "single common scheme or plan." U.S. SENTENCING GUIDELINES MANUAL § 4A1.2, cmt. n.3. Consolidation "for trial or sentencing" makes them related for purposes of that guideline, Petitioner contends. *Id.*

Relatedness in general, and consolidation in specific, presents a "classic mixed issue" of law and fact, as the court of appeals admitted. *Buford*, 201 F.3d at 941. A court must apply a legal standard, set out in the guideline and its application notes,[4] to classify historical facts, namely what happened in another crime and another court that led to a prior conviction.

Several controversies in recent years have prompted this Court to determine the standard of review for various mixed questions of law and fact. Petitioner begins with a survey of those decisions, covering the last fifteen years. She then assesses the decision of the United States

[4] The application notes bind courts if consistent with constitutional provisions, statutes, and the Guideline itself. *Stinson v. United States*, 508 U.S. 36, 38 (1993).

Court of Appeals for the Seventh Circuit in this case, finding that it does not hew to this Court's teaching. Finally, she argues that de novo review of this mixed question best allocates judicial roles and time in the tiered federal courts.

I. OVERVIEW: THE COURT'S MIXED QUESTION STANDARD OF REVIEW JURISPRUDENCE SINCE 1985.

Over the last fifteen years,[5] this Court has rendered a series of decisions on the proper standards of review for mixed questions of fact and law. The Court has identified factors that counsel de novo review, and others that suggest deferential review. These cases provide the analytical framework for the question here.

A. De Novo Review.

De novo review usually follows in these circumstances: When the decision does not hinge on credibility

[5] Petitioner selected a starting point that she thinks reasonable, given page limits. Even so, it excludes by one year the decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), which explored the related idea of constitutional fact and divided the Court over describing the question in dispute. Petitioner also sets aside *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), which held that discriminatory intent in a Title VII claim is a pure question of fact subject to clear error review under Fed. R. Civ. P. 52(a). The Court may note that the specific topic of appellate review of mixed questions of law and fact interested scholars decades before 1985. *See, e.g.*, Francis A. Bohler, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924).

determinations; when the relevant legal principle acquires meaning only through application to particular facts; when deferential review would lead to inconsistent results; when there is a particular need for appellate courts to maintain control of and to clarify legal principles; or when there is a strong need to provide a defined set of rules for actors whom the legal standards affect. These factors apply to deciding if prior convictions were "related" or "consolidated" for purposes of U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2).

1. Mixed issues that do not turn on credibility determinations usually warrant de novo review. For example, in *Miller v. Fenton*, 474 U.S. 104 (1985), the Court considered whether a state court finding of a confession's voluntariness commands a presumption of correctness in a federal habeas proceeding. Under 28 U.S.C. § 2254(d), as current then, on collateral review federal courts presumed correct a state court's findings of fact unless the record as a whole left the factual conclusions unsupported. This Court held, though, that the ultimate question of voluntariness is legal and deserves independent federal determination. *Id.* at 112.

The *Miller* Court addressed practical considerations of independent federal review. Because credibility findings at last do not resolve the issue, a state court judge occupies no better position than a federal judge from which to gauge voluntariness. *See id.* at 116-17. *Miller v. Fenton* acknowledged that underlying facts, such as police tactics, enjoy a presumption of correctness. Yet voluntariness historically is a legal issue. In the end, the voluntariness inquiry asks whether the techniques for

extracting a confession comported with a "system that presumes innocence and assures that a conviction will not be secured by inquisitorial means." *Id.* at 115.

Likewise, in *Thompson v. Keohane*, 516 U.S. 99 (1995), also concerning the § 2254(d) presumption of correctness, the Court held that a state court determination whether a suspect was in "custody," and entitled to advice of rights under *Miranda*, is a mixed question of fact and law subject to de novo federal review. 516 U.S. at 106. The Court described two inquiries that trial judges must make in assessing custodial status: First, what were the circumstances surrounding the investigation; and second, given the circumstances, would a reasonable person have felt free to leave?

The first inquiry, of course, is factual and the trial court's findings there deserve a presumption of correctness. *Id.* at 112. The second inquiry, however, is a mixed question on which the trial court claims no advantage over the reviewing court. *Id.* at 112-13. Considering that custodial status usually does not turn on credibility determinations, and that trial courts have no first-person perspective on whether a defendant was in custody, this Court found that practical considerations do not require deferential review. *Id.* at 113-14.

Similarly, because credibility determinations do not resolve whether a set of facts constitutes probable cause or reasonable suspicion, in *Ornelas v. United States*, 517 U.S. 690 (1996), the Court ruled that a district court's approval of a warrantless search under the Fourth Amendment merits de novo review. As in *Thompson v.*

Keohane, the Court prescribed a dual inquiry into reasonable suspicion and probable cause. Initially, a trial court must determine the facts underlying the stop or search – a strictly factual inquiry. Then it must assess whether those facts constituted reasonable suspicion or probable cause for an objectively reasonable police officer – a mixed question of fact and law. *Id.* at 696.

Two years later, in *United States v. Bajakajian*, 524 U.S. 321, 336 (1998), the Court declared de novo review for a district court's ruling that a forfeiture offends the Eighth Amendment's Excessive Fines Clause. The Court saw that as a mixed question. Applying the dual-inquiry format of *Thompson* and *Ornelas*, the Court said that an appellate court must accept a district court's factual findings unless clearly erroneous. However, deciding whether a fine is excessive requires applying a constitutional standard to those facts, a de novo exercise that does not entail credibility determinations. *Bajakajian*, 524 U.S. at 336 n.10.

Most recently, in *Lilly v. Virginia*, 527 U.S. 116, 136-37 (1999), a plurality (Justices Breyer, Ginsburg, Souter and Stevens) agreed that a state trial court's evidentiary decision to admit a non-testifying accomplice's statement inculpating the accused, over a Confrontation Clause objection, warrants de novo review.[6] The plurality

[6] Chief Justice Rehnquist, with Justices O'Connor and Kennedy joining, concluded that federal courts should review deferentially the state trial court's decision to admit a non-testifying accomplice's statement. Although the Chief Justice conceded for sake of argument that the issue may be a mixed question of fact and law, he wrote that the mix weighs heavily on the fact side and that the trial court is best situated to decide whether a particular statement is so reliable that cross-examination would add little to its trustworthiness. *Lilly*, 527 U.S. at 148-49 (Rehnquist, C.J., concurring in the judgment).

favored again a two-step analysis, under which a federal court would review the state trial court's findings of historical fact for clear error but decide de novo whether proffered guarantees of trustworthiness satisfy the Confrontation Clause. *Id.* at 137. De novo review is appropriate, the plurality argued, because a Sixth Amendment admissibility determination does not turn on the declarant's in-court demeanor, or on any other factor uniquely suited to the trial court. *Id.*

Determining whether cases are "related" for purposes of U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2), like analyzing whether a confession is voluntary or deciding whether police had probable cause to conduct a warrantless search, does not require a credibility determination. An appellate court first should review the district court's historical fact findings for clear error in this setting. But the district court's second decision whether facts make the cases "related" under the Sentencing Guidelines turns not on credibility and lends itself to de novo review.

2. Next, de novo review makes good sense when the relevant legal principle acquires meaning only through application to particular facts. For example, reasonable suspicion and probable cause do not reduce easily to legal rules, the Court observed in *Ornelas*, but instead gain their meaning from the particular settings in which courts explain those standards. *Ornelas*, 517 U.S. at 696. The concepts of custodial status, excessive fines, and

voluntariness of confessions likewise acquire meaning only by application to particular facts.

Similarly, the term "related cases" for purposes of § 4A1.2(a)(2) is not readily shaped in the abstract into sharp definition. Must cases be consolidated formally to be "related?" Or, may cases be "related" through functional consolidation? If the latter, what constitutes functional consolidation? The Sentencing Guidelines do not answer these questions. Rather, the answers come incrementally by construing and then applying the term "related cases" to changing facts. That mixed question invites de novo review.

3. De novo review also applies when deferential review would lead to intolerably inconsistent results. The Court raised that concern in *Ornelas*, where it warned that deferential review of reasonable suspicion and probable cause would lead to uneven constitutional standards throughout the nation:

> A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." [Citation omitted]. Such varied results would be inconsistent with the idea of a unitary system of law.

Id. at 697 (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)).

Consistent results also matter when federal courts apply state law, for this Court cemented that goal in the very foundations of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64

(1938). Not surprisingly, then, in *Salve Regina College v. Russell*, 499 U.S. 225 (1991), this Court held that, in diversity cases, federal appellate courts will review de novo district court determinations of state law. The Court noted the appellate courts' inherent advantage in confronting legal issues, given the time those courts allow for "reasoned reflection" and the "collaborative judicial process that promotes decisional accuracy." *Salve Regina College*, 499 U.S. at 231.

Further, *Salve Regina College* rejected the argument that a district judge's proximity trumps in determining the law of the state in which the district judge sits. The "bases of state law are as equally communicable to the appellate judges as they are to the district judge," this Court reasoned. *Id.* at 238.

This concern for consistent results applies equally to the Sentencing Guidelines, given their preeminent purpose of uniform sentencing for similarly placed defendants. *Koon v. United States*, 518 U.S. 81, 92, 113 (1996); *id.* at 119 (Breyer, J., concurring in part, dissenting in part); *see generally Mistretta v. United States*, 488 U.S. 361, 365-67 (1989). Whether cases are "related," therefore, should not depend on the varying textual interpretations of federal district judges. Historical facts will vary, but the meaning of the terms applied to them should not.

4. Similarly, de novo review is appropriate when appellate courts have a strong need to maintain control of and to clarify legal principles. The *Lilly* plurality, with respect to the Sixth Amendment's Confrontation Clause, wrote that independent review is required to " 'maintain control of, and to clarify, the legal principles' governing

the factual circumstances necessary to satisfy the protections of the Bill of Rights." 527 U.S. at 136 (quoting *Ornelas*, 517 U.S. at 697).

Independent appellate review also would serve to clarify the principles governing the Sentencing Guidelines. As case law develops, and the appellate courts offer clear explanations and examples of what the term "related" means under § 4A1.2, district judges will rely on a better-defined standard.

5. Finally, de novo review is proper when courts should provide a defined set of rules for the actors affected by the legal standards. In *Thompson v. Keohane*, for example, the Court reasoned that because determining whether a suspect was in "custody" could have universal application, independent review of custodial status would guide police, unify precedent and stabilize the law. *Thompson v. Keohane*, 516 U.S. at 114-15. Comparably in *Ornelas*, the Court said that de novo review of the district court's conclusions regarding "reasonable suspicion" and "probable cause" would unify precedent and provide police with a defined set of rules. *Ornelas*, 517 U.S. at 697.

Here, too, the actors whom the Sentencing Guidelines most affect – defendants, district judges, and lawyers on both sides – would benefit from a defined set of standards governing the Sentencing Guidelines. The appellate courts define standards best.

B. Deferential Review.

1. In contrast, mixed question cases in which this Court adopted a deferential standard of review have

concerned circumstances missing here, such as elusive, fact-intensive inquiries and credibility determinations. For example, in *Pierce v. Underwood*, 487 U.S. 552, 559 (1988), the Court held that a district court's views on whether the government's position in a case was "substantially justified," and whether the prevailing party wins attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), face review only for abuse of discretion.

As in cases where the Court found de novo review proper, *Pierce v. Underwood* asked a practical question: Does one judicial actor hold a better place than another to decide the issue? The Court took note that factors bearing importantly on justification for the government's position, such as the quality of evidence, may be known only to the district court through settlement conferences and other pretrial activities. 487 U.S. at 559.

The *Pierce v. Underwood* approach focuses on the practical qualities of the mixed question as a whole, not on distinguishing its factual aspect from its legal aspect. That approach mostly avoids the "notoriously difficult" definitional problem of separating fact questions from law questions. Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 11 (1991).

Independent appellate review of the government's position also would be unusually cumbersome, the *Pierce v. Underwood* Court observed, because the appeals court would have to review the entire record to determine whether opposing the merits decision was substantially justified, in addition to determining whether the district court's merits ruling was right. 487 U.S. at 560. The Court

reasoned finally that de novo review is not appropriate because asking whether the government's position was substantially justified is "a multifarious and novel question, little susceptible, for the time being at least, of useful generalization." *Id.* at 562.

The Court undertook a similar analysis in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), which held that a sanction decision under Fed. R. Civ. P. 11 merits review for abuse of discretion. Deciding whether sanctions are appropriate under Rule 11 is a fact-intensive and case-specific undertaking, often requiring credibility determinations. *Cooter & Gell*, 496 U.S. at 401-02. Consequently, the district court occupies a better seat from which to decide a Rule 11 motion than does the court of appeals.

Further, as in *Pierce v. Underwood*, an appeals court reviewing de novo would have to determine whether an attorney's theory appeared plausible. That either would fail to produce law-clarifying benefits if the law already was clear or would establish the law in a peculiarly indirect manner if it was unclear. *Id.* at 403-04. The Court appreciated that, while district court definitions of conduct violating Rule 11 may vary, some variation is inevitable in applying a standard based on reasonableness. *Id.* at 404-05.

2. In *Koon v. United States*, the Court held that a sentencing judge's ultimate decision to depart either up or down from the Guideline range should be reviewed for abuse of discretion. Congress intended district courts to retain much of their traditional sentencing discretion, although the Court acknowledged that appellate review

should not be an "empty exercise." *Koon*, 518 U.S. at 98. For that reason, an appeals court must give due deference to the district court's application of the Guidelines to the facts, *id.* at 98 (citing 18 U.S.C. § 3742(e)(4)), but must review independently questions of law that arise when determining whether to depart from the Guidelines. *Id.* at 100.

Still, the Court decided that the abuse-of-discretion standard includes ensuring that mistaken legal conclusions did not guide the sentencing judge's discretion. *Id.* at 100. *Koon* said the district court can decide better whether a departure is appropriate, given the heavily factual nature of that inquiry. *Id.* at 99.

Additionally, the Court noted, the district court's departure decision involves consideration of unique factors not susceptible to generalization. Therefore, de novo review would not likely establish clear guidelines for lower courts. *Id.*

3. In summary, the Court in recent years often has considered the appropriate standard of review for mixed questions of law and fact. The federal courts of appeal frequently have disagreed on the proper standard of review for a particular mixed question, and this Court has provided the final answer. Whether the Seventh Circuit drew properly from earlier cases is another question still.

II. THE SEVENTH CIRCUIT INCORRECTLY APPLIED THIS COURT'S DECISIONS.

As the Seventh Circuit acknowledged, the standard of review for a district court's ruling on the relatedness of prior convictions has divided the courts of appeal. App. 59-60; *Buford*, 201 F.3d at 941.[7]

Before this case, the appellate decisions addressing the standard of review in this setting provided almost no helpful reasoning. The courts that adopted a de novo

[7] By the Seventh Circuit's tally, App. 60; *Buford*, 201 F.3d at 941, six circuits review relatedness deferentially. *United States v. Mapp*, 170 F.3d 328, 338 (2d Cir.), *cert. denied*, 120 S. Ct. 239 (1999); *United States v. Huggins*, 191 F.3d 532, 539 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1968 (2000); *United States v. Irons*, 196 F.3d 634, 640 (6th Cir. 1999); *United States v. Bartolotta*, 153 F.3d 875, 879 (8th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); *United States v. Wiseman*, 172 F.3d 1196, 1219 (10th Cir.), *cert. denied*, 120 S. Ct. 211 (1999); and *United States v. Mullens*, 65 F.3d 1560, 1565-66 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112 (1996). Three others review relatedness de novo, again as *Buford* counted them. *United States v. Correa*, 114 F.3d 314, 317 (1st Cir.), *cert. denied*, 522 U.S. 927 (1997); *United States v. Huskey*, 137 F.3d 283, 285 (5th Cir. 1998); and *United States v. Allen*, 153 F.3d 1037, 1045 (9th Cir. 1998), *cert. denied*, 525 U.S. 1170 (1999).

After *Buford*, the Third Circuit also weighed in on the side of deferential review. *United States v. Beckett*, 208 F.3d 140, 147-48 (3d Cir. 2000). That would make the split now 8 – 3.

However, the Seventh Circuit arguably misread *Wiseman*. The Tenth Circuit there held that, "The district court's determination of whether offenses were related is a factual determination which we review only for clear error, but we review the application of the sentencing guidelines, including the meaning of the term 'related,' de novo." *Wiseman*, 172 F.3d at 1219.

standard offered little analysis; so too the courts that adopted a deferential standard.

By comparison, the Seventh Circuit fairly explained its view. While colorful, though, the Seventh Circuit's opinion did not reflect the hues of this Court's standard-of-review decisions in recent years.[8] This Court should reverse.

A. Seventh Circuit's Focus.

1. Initially, the Seventh Circuit hedged in describing the nature of the issue. The court below first wrote that this was a "classic mixed issue," App. 60; *Buford*, 201 F.3d at 941, and that relatedness and consolidation "are not pure questions of law." *Id.* But the court later held that

[8] At least one academic commentator would disagree. Professor Evan Tsen Lee has praised the Seventh Circuit in particular for leaning toward deferential review of mixed questions. Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 237, 247-56 (1991).

But Professor Lee in the end makes a circular argument for deferential review of mixed questions "unless, in a particular case, review of such findings would produce meaningful precedent." Lee, *supra*, at 285. Once a court of appeals resolves to review de novo, its independence will allow meaningful precedent in almost any case, especially if it reverses (which Professor Lee considers important). So the meaningful precedent criterion does not help in deciding what standard of review to employ at the outset. It also contradicts the systemic principle that happenstance of individual consequences in one case does not, and should not, determine a standard of review for the many cases; see discussion *infra*, at 30-32.

"whether cases have been 'consolidated' for trial or sentencing is a matter of fact." *Id.* at 942.

This shifting description may explain why the *Buford* court clung to the terms "clearly erroneous," *id.* at 940, and "clear error," *id.* at 942, in the face of this Court's explanation in *Ornelas* that the preferable term for deferential review of mixed questions is "abuse of discretion." 517 U.S. at 694 n.3. *Ornelas*, which also arose from the Seventh Circuit, noted that "clear error" is a term of art derived from Fed. R. Civ. P. 52(a) and applying to questions of fact. The Seventh Circuit nowhere mentioned – or heeded – *Ornelas*.

2. Instead, the court of appeals relied principally on this Court's standard of review decisions in civil cases under Rule 52(a). *See Buford*, 201 F.3d at 941 (citing *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); and *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986)). That rule draws two categories, findings of fact and conclusions of law, and instructs a reviewing court not to set aside fact findings "unless clearly erroneous." Fed. R. Civ. P. 52(a).

Although 18 U.S.C. § 3742(e) also sets a clear-error standard for fact findings in this context, Petitioner does not seek de novo review of pure facts. Surely, too, the "due deference" standard in § 3742(e) does not compel deferential review for mixed questions, like relatedness and consolidation; appellate courts owe district courts only the deference "due" on a given issue. *Cf. Koon*, 518 U.S. at 98 (deference due depends on nature of question). Petitioner asks de novo review only of a mixed question, specifically the applied meaning of "related" and the

subsidiary term "consolidated." A district court commands little, if any, deference on this interpretive task.

3. In this regard, the court of appeals overlooked *Ornelas* and even some of its own mixed question decisions[9] that teach the importance of distinguishing historical facts, reviewed deferentially, from the ultimate conclusion on a mixed question, which may (or may not) merit de novo review. *Ornelas*, 517 U.S. at 696-97, 699; *id.* at 701 (Scalia, J., dissenting); *Thompson v. Keohane*, 516 U.S. at 112-13.

B. The Proper Role of *Koon*.

1. While the court of appeals did not pass by *Koon v. United States* as it did *Ornelas*, it read *Koon* quite broadly. Again, *Koon* held that appellate courts should not review departure decisions de novo, but rather should ask whether the sentencing court abused its discretion. *Koon*, 518 U.S. at 91. That ruling pivoted on the standards for departure, which require that "certain aspects of the case must be found unusual enough for it to fall outside the

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[9] *E.g., United States v. D.F.*, 115 F.3d 413, 415-19 (7th Cir. 1997), an opinion after remand for reconsideration in light of *Ornelas*. *United States v. D.F.*, 63 F.3d 671 (7th Cir. 1995), *vacated and remanded*, 517 U.S. 1231 (1996). In the second *D.F.* opinion, the Seventh Circuit abandoned its previous deferential standard of review for the voluntariness of confessions, and distinguished carefully between historical facts and the final conclusion of involuntariness. *See also United States v. Frederick*, 182 F.3d 496, 502-04 (7th Cir. 1999) (Diane P. Wood, J., concurring) (objecting to suggestion that most mixed questions receive deferential review; discussing *Ornelas* and other decisions).

heartland of cases in the Guideline . . . [T]he district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.* at 98. "[A] district court's departure decision," this Court explained further, "involves 'the consideration of unique factors that are "little susceptible . . . of useful generalization." '" *Id.* at 99 (quoting *Cooter & Gell*, 496 U.S. at 404).

The Seventh Circuit started with *Koon's* correct thesis that departures demand a trial judge's traditional sentencing discretion in weighing all factual nuances of a defendant and her crime. But it leapt a great distance to the proposition that therefore, "Questions concerning application of the Guidelines generally are reviewed deferentially, . . . unless the district court makes an identifiable legal mistake." *Buford*, 201 F.3d at 942.

That leap was too long. True, the abuse of discretion standard allows an appellate court to correct mistakes of law, *Koon*, 518 U.S. at 100, but it hardly follows necessarily that all legal interpretations of Guidelines terms or mixed questions arising under the Guidelines therefore receive only deferential review. Justice Breyer, while chief judge of the First Circuit, anticipated and could have prevented the Seventh Circuit's mistake:

> Plenary review is also appropriate where the appellate court, in deciding whether the allegedly special circumstances are of a "kind" that permits departure, will have to perform the "quintessentially legal" function [citation omitted] of interpreting a set of words, those of an individual guideline, in light of their intention

> or purpose, in order to identify the nature of the guideline's "heartland". . . .

United States v. Rivera, 994 F.2d 942, 951 (1st Cir. 1993) (Breyer, C.J.). Because "the district court has no special competence in performing this kind of classic textual analysis," *Rivera*, 994 F.2d at 951, a court of appeals owes no special deference to the lower court on that task. *See also United States v. Doe*, 18 F.3d 41, 43-44 (1st Cir. 1994) (Breyer, C.J.).

2. As Petitioner has noted, much of the task here is legal. The district court had to decide what the term "related" meant, U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2), and also had to interpret the term "consolidated" in the Guideline's third application note. Those jobs demanded none of the discretion necessary in departure decisions, or even in fashioning a sentence in the end. A district court had "no comparative expertise in resolving the 'quintessentially legal' issue . . . ," *Doe*, 18 F.3d at 44 (quoting *Rivera*), that was a predicate of Petitioner's sentence.

Moreover, determinations of what prior convictions are related, or whether another court consolidated earlier proceedings for trial or sentencing, typically do not depend on credibility evaluations or even on burdens of persuasion. To the contrary, these determinations hinge on state court (or occasionally federal court) records in the usual case. Whether the pertinent documents are transcripts, pleadings, docket entries, or other materials, they involve an assessment of paper, not people. District judges have no institutional advantage in that task, either.

In short, departures necessarily turn on "exceptional degree" or fulsome facts lying outside an indistinct "heartland." *Koon*, 518 U.S. at 96. Interpretation and application of specific Guideline terms, using paper-and-ink court records, do not. Whether to depart is a question well removed from whether prior cases were related or consolidated. So it is true that a court of appeals "shall give due deference to the district court's application of the guidelines to the facts," 18 U.S.C. § 3742(e), but equally true that, "The deference that is due depends on the nature of the question presented." *Koon*, 518 U.S. at 98.

C. Why Appeals At All?

1. The Seventh Circuit's concluding argument for deferential review attempted to prove too much. "How best to understand the events in the Wisconsin courts in spring 1992 has no significance beyond these parties," that court posited. "Someone has to select a characterization of complex facts, and the best candidate for that role is the district judge." App. 62; *Buford*, 201 F.3d at 942.

For sake of argument, Petitioner accepts the insignificance of the district court outcome here to those not parties. Yet closely viewed, the dispositive issue in most appeals has no significance beyond the parties and those closely allied with them. The Seventh Circuit's observation is not so much an argument for deferential review, then, as it is an argument for not erecting an error-correcting appellate structure, available of right, at all.

This Court, with a largely discretionary jurisdiction exercised in cases of surpassingly broad importance, would suffice if the Seventh Circuit's argument were persuasive.

But it is not persuasive. Even apart from the truism that criminal cases address societal, not individual, harms, the organizing principle of a tiered federal judiciary is not just the sweep of a particular lawsuit's significance to a democratic society. It is instead the particularly sweeping significance in a democratic society of resolving lawsuits justly. We make appeals available of right not because any one error in a trial court makes a great difference to many, but because many small errors in trial courts, uncorrected, would make a great difference to all. They would undermine the government's perceived ability to govern justly, and thus its very legitimacy to govern in a democracy at all.

2. In deciding standards of review, this Court never has focused on the reach or personal significance of a particular case's outcome, although it raised that possibility in *Pierce v. Underwood*, 487 U.S. at 563. The Court surely has considered whether facts driving an outcome are fleeting, unlikely to recur, or resistant to general description. *See, e.g., Cooter & Gell*, 496 U.S. at 401-05; *Pierce*, 487 U.S. at 562. But that is different. The peculiarities of a specific type of factual inquiry or of the sources from which judges must draw mixed conclusions rightly may affect assignment of responsibilities within the ranks of federal courts, as this Court understands. The mere peculiarities of the parties present or of the outcome's impact rightly cannot.

3. Writing in a different context, Professor Gewirtz captured the rightful role of appellate courts:

> There are three main functions that a judicial opinion serves: first, to give guidance to other judges, lawyers, and the general public about what the law is; second, to discipline the judge's deliberative process with a public account of the decision, thus deterring error and corruption; and, third, to persuade the court's audiences that the court did the right thing.

Paul Gewirtz, *On 'I Know It When I See It,'* 105 YALE L.J. 1023, 1039 (1996).

Judge Kozinski approached the same point when he observed, "Judges have traditionally held a special place in the public's mind as arbiters of our disputes and protectors of our individual freedoms. But judges can only do that job if they are trusted." Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 998 (1993). Petitioner would not discount the third of Gewirtz's functions of an appellate decision, or the importance even in the small case of maintaining public trust in judging and in judges.

4. The Seventh Circuit should have focused, then, on the best judicial actor to assure uniformity and accuracy of outcomes in like cases and to provide guidance to other judges and future litigants, as this Court has. Focusing instead on the stakes to these particular litigants helped little in assigning roles within the federal courts. Petitioner recasts her focus now.

III. DE NOVO REVIEW OF THIS MIXED QUESTION BEST ASSIGNS JUDICIAL DUTIES IN THE FEDERAL COURTS.

Past decisions point generally toward the appropriate standard for a given mixed question, rather than predicting the standard specifically. Those earlier decisions suggest that application of the Sentencing Guidelines' doctrine of "related cases" in § 4A1.2(a)(2) falls on the side of de novo review.

A. Synopsis.

Generally, the standard of review on a mixed question turns on which judicial actor is best suited to resolve the issue. If the district court has the advantage because of proximity to witnesses, to litigants, or to relevant events themselves, then the appellate court should review for clear error. *See, e.g., Pierce v. Underwood*, 487 U.S. at 559-60. If, on the other hand, the appellate court enjoys an institutional advantage because of its time, focus, role in forming and clarifying the law, or collaborative practice of hearing cases in panels, then it should review de novo. *See id.* at 559-60; *Salve Regina College*, 499 U.S. at 231-32; *Miller v. Fenton*, 474 U.S. at 114-17; *see also* Sward, *supra*, at 13-16 (competence, fairness, and efficiency the main reasons for de novo review of legal questions).

B. Analysis.

1. The task of determining criminal history for Sentencing Guidelines purposes, and the relatedness of prior convictions, offers no advantage to the trial court. The

events at stake – prior crimes and prosecutions – take place earlier and elsewhere, beyond the district court's observation. The determination of relatedness depends not on witnesses or their credibility, but on documents.[10] Those documents usually come from the files of a court, and only their meaning (not their authenticity) ordinarily is in question.

This Court has no reason to assume that the court documents will be local to the district court, or even from a familiar state court; a defendant's prior convictions may arise anywhere. To the extent that such documents or a presentence investigation report bear critically on the decision, they are as much available to the court of appeals as to the district court.

2. The conduct of the immediate parties before the district court also has no effect on the relatedness dispute, which is not an issue enmeshed in supervision of litigation, such as a Rule 11 sanctions decision or an award of attorney's fees under the Equal Access to Justice Act. *See Salve Regina College*, 499 U.S. at 233.

3. Most importantly, perhaps, the task of evaluating relatedness or consolidation entails deciding what a particular Sentencing Guideline, § 4A1.2(a)(2), and its application note mean. This "quintessentially legal" task is the

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[10] Petitioner appreciates that questions of fact receive deferential review even if findings rest not on credibility determinations, but on documents or inferences. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). However, *Anderson* was a Rule 52(a) case explicitly concerned only with questions of fact. This case presents a decidedly mixed question.

core work of appellate courts. *See Rivera*, 994 F.2d at 951; *Doe*, 18 F.3d at 43-44.

Applied to facts, this legal exercise resembles a determination of state law in actions within a federal court's diversity jurisdiction, or a determination of foreign law – both assessments of what unfamiliar courts did or would do. In those situations, federal appellate courts review de novo, having the institutional advantage in apprehending the law of other jurisdictions by review of documents. *Salve Regina College*, 499 U.S. at 231 (de novo review of state law determinations); Fed. R. Civ. P. 44.1, Fed. R. Crim. P. 26.1 (district court's ruling on foreign law treated as question of law); *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 604 (2d Cir. 1999) (de novo review of foreign law determination). The appellate courts have a similar duty here, too.

4. Indeed, their duty is stronger on this point. For the federal courts are not assessing the law of separate sovereigns, they are interpreting a federal sentencing guideline and its commentary. Federal text contains the terms "related" and "consolidated." There is no reason to believe that the Sentencing Commission intended federal courts to adopt a state law rule of decision (let alone fifty states' rules) in determining which prior convictions are related. The opposite is true. The related case provision of § 4A1.2 traces its origins to a federal source, the United States Parole Commission's salient factor score, although it differs from the Parole Commission's simpler rule. Daniel P. Bach, *Reconsidering Related Conduct*, 9 FED. SENT. REP. 198, 199-200 (1997); Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 FED. SENT. REP. 192, 192-93 (1997).

Federal rules of decision under the United States Sentencing Guidelines serve, and preserve, the essential role of those guidelines. The overarching Congressional purpose in enacting the Sentencing Reform Act of 1984 was to promote uniformity of federal sentencing practices. *See Koon*, 518 U.S. at 97.

Only de novo review of this issue, allowing a clear federal rule to develop and persist, holds true to that purpose of uniformity. Deferential review, or a clear error standard as the court below called it, necessarily means that an appellate court lets stand conclusions that may be wrong, if not wildly so (and not wrong by reason of wholly legal misunderstanding). In other words, different district courts would be free under that standard reasonably to reach opposing conclusions about relatedness on the same documentary record, and then on those conclusions alone to impose dramatically different sentences.

Whatever its possible merits, that regime would conflict badly with the legislative goal for the Sentencing Commission and its guidelines. Sentencing of like offenders would be less uniform, for what one district judge might consider functional consolidation of prior convictions another district judge might not. Disparate effects on identically situated defendants often would follow those differing conclusions. Petitioner, who saw her sentence nearly doubled because of the district court's relatedness ruling, stands as only one example.[11]

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[11] The consequences of the outcome are not insignificant, either, if that is one criterion. To reduce the importance of the added loss of liberty to Petitioner alone, as the Seventh Circuit did, again is to promote a judicial system without appellate review of right, not to illumine the better judicial actor to make the final call within the system we have.

5. *Koon*, with its abuse-of-discretion review of departure decisions, certainly did not undercut the central importance of uniformity in federal guideline sentencing. A departure is the last decision a sentencing judge makes in the intellectual process of applying the guidelines. As a matter of structure, departures follow relevant conduct determinations, offense level calculation, grouping, and criminal history scoring.

In a real sense, the departure decision then represents the judge's ultimate call on the exactly appropriate punishment. It "embodies the traditional exercise of discretion by a sentencing court." *Koon*, 518 U.S. at 98; *see also Williams v. United States*, 503 U.S. 193, 205 (1992) ("The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court").

In contrast, an interpretation of guideline text, like the term "related" for criminal history purposes, is at most a penultimate call. Although it often affects the eventual sentence indirectly, it resides in the field of predicate legal or mixed determinations that together culminate in the ultimate exercise of sentencing discretion.

So while the reasons for discretion reach their zenith at the moment a judge must integrate all of the factual findings, legal interpretations, and less concrete nuances that result in the final reckoning for one person, those

reasons for discretion are less compelling lower in the arc as the judge proceeds first through predicate interpretations. There is no more need for a district court's broad discretion, or an appellate court's corresponding deference, in textual interpretation under § 4A1.2 than in any other legal construction of a statute or rule. True, Petitioner speaks not of merely mathematical errors in applying the Guidelines, but of textual interpretation. Still, "the appellate court will be in as good a position to consider the question as the district court was in the first instance." *Koon*, 518 U.S. at 98. And on these issues of guideline construction, uniformity matters most.

6. Finally, two federalism concerns bear on the proper standard of review here. First, state *procedural* rules and quirks should not sway the resolution of federal prosecutions, any more than state procedure ordinarily binds federal courts sitting in diversity. *See generally Hanna v. Plumer*, 380 U.S. 460, 471-74 (1965); *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 9-14 (1941). There is no good reason that federal sentences for federal crimes should vary nearly two-fold, as here, solely on the differing views that district courts might take of the vagaries of local procedure or practice in clogged state courts across the country.

Depending on the size of the county, the volume of its courts, and an unimagined list of intangibles, state judicial procedures may tilt heavily to the oral and informal. That informality may follow the familiarity that comes when the same assistant prosecutors and state public defenders, or lawyers ensconced in a single courthouse, appear several times daily before the same local

judges. Especially in very busy counties, clerical procedures likewise may be irregular, unfathomable from outside, or simply inefficient. Those factors ought have no bearing on federal assessments of culpability, if federal sovereignty deserves the same respect in its proper realm as state sovereignty in its.

To preserve federal sovereignty, that the nation's district courts may act on federal law and not on the accidents of state procedure, appellate courts must claim the leading role in fixing and clarifying a federal rule on the consolidation and relatedness of earlier convictions. Left to reign, the impact of state procedural quirks would not be trivial, for federal offenders and the United States dispute the relatedness of prior convictions frequently. *See* Bach, *supra*, at 198 & n.1.

Second, the appellate courts can reduce friction with co-equal state sovereigns by making clear what federal courts will view as consolidation, and what they will not. De novo review offers better guidance in this respect to state courts as well as to federal district courts. A state judge who wants her actions understood later in federal court as she understands them will have a more reliable place to look if twelve federal circuits control the rule, not ninety-four districts. With a de novo standard, the interpretation of state court actions becomes less haphazard in federal district court.

That consistency and predictability will serve the integrity of all courts, state and federal. More, it best will persuade an appellate "court's audiences that the court did the right thing." Gewirtz, *supra*, at 1039.

CONCLUSION

Petitioner prays that the Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit, remand for reconsideration under a de novo standard of review, and direct the court of appeals to proceed in a manner consistent with this Court's opinion.

Respectfully submitted,

DEAN A. STRANG
Counsel of Record
BRIAN P. MULLINS

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FEDERAL DEFENDER SERVICES OF
EASTERN WISCONSIN, INC.
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 221-9900

Of Counsel
ROBERT A. KAGEN
316 North Milwaukee Street,
Suite 401
Milwaukee, Wisconsin 53202
(414) 271-8989